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PHOENIX, ARIZONA

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DEPARTMENT OF LAW LETTER OPINION NO. 74-14-L (R-25)

REQUESTED BY: HAROLD H. MOORE
Superintendent
Arizona State Department of
Liquor Licenses and Control

QUESTION: May a private club hold a Series 6, 7 or 8 spirituous liquor license if the club excludes the general public from the premises for which the spirituous liquor license has been issued?

ANSWER: No.

In Hooper v. Duncan, 95 Ariz. 305, 389 P.2d 706 (1964), the Arizona Supreme Court summarized a number of the guiding principles relative to the regulation of alcoholic beverages. In Hooper, supra, the court stated that a liquor license is a temporary privilege, personal in nature, issued in the exercise of the police power of the state. No one has an absolute right to the issuance of such a license. State control of liquor licenses under the police power ranges from complete prohibition to lesser degrees of regulation and surveillance. Kearns v. Aragon, 65 N.M. 119, 333 P.2d 607, 610 (1958), as cited in Hooper, supra.

In Lane v. Ferguson, 62 Ariz. 184, 190, 156 P.2d 236 (1945), the court stated:

> . . . [T]he legislature, in creating the Department of Liquor Licenses and Control, intended to create and establish state-wide control over the traffic in intoxicating liquors. The need of its regulation and control is undisputed. . . . Running through the entire act is the central idea that the traffic in intoxicating liquors is a problem that is state-wide; and correspondingly that only state supervision and control can adequately cope with it. . . .

In Mendelsohn v. Superior Court of Maricopa County, 76 Ariz. 163, 261 P.2d 983 (1953), the Arizona Supreme Court stated that, in considering the fact that the liquor laws are designed to protect the health, temperance and safety of all citizens by providing strict regulation and control of the manufacture, sale and distribution of alcoholic beverages, there are four parties to be considered in all applications for liquor licenses. Those parties are: (1) the applicant, (2) the state, (3) the local political governing body, and (4) those citizens who will be peculiarly affected by granting the license, because of their close ties to the neighborhood wherein the liquor business is operated.

Subsection B of A.R.S. § 4-209 lists the sixteen different types of licenses available to the public and provides in part:

> B. Issuance fees for original licenses shall be:
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> * * *
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> 6. On-sale retailer's license to sell all spirituous liquors by individual portions and in the original containers. . . .
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> 7. On-sale retailer's license to sell wine and beer by individual portions and in the original containers. . . .
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> 8. On-sale retailer's license to sell beer by individual portions and in the original containers. . . .

A.R.S. § 4-244 provides in part:

> It is unlawful:
>
> 1. For a person to buy for resale, sell or deal in spirituous liquors in this state without first having procured a license duly issued by the board.
>
> 2. For a person to sell or deal in alcohol for beverage purposes without first complying with the provisions of this chapter.

It is thus apparent that the Legislature has specifically limited the methods by which the public can partake in the distribution and consumption of intoxicating liquors. See also Attorney General Opinion No. 70-9.

How does the private club which holds a Series 6, 7 or 8 liquor license and excludes the general public fit within this statutory framework? Title 4 of the Arizona Revised Statutes authorizes the exclusion of the public from licensed facilities under expressly limited circumstances. A.R.S. § 4-101.4 defines "club", and subsections (a) through (e) thereunder describe a variety of clubs and other organizations which receive special treatment under the liquor laws. It is obvious from these definitions that the Legislature intended to place certain restrictions upon the availability of club licenses without limiting the number of such licenses which can be issued (A.R.S. §§ 4-205.B and 4-206.D). The regulatory provisions of A.R.S. § 4-205 prescribe a limited function for club licenses. A.R.S. § 4-205 provides:

> A. The board may issue one club license to any club as defined in § 4-101.
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> B. The provisions of § 4-206, except subsection D, shall not apply to nor in any manner restrict the issuance of a club license pursuant to or within the provisions of this section.
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> C. The holder of a club license is authorized to sell and serve alcoholic beverages for consumption only within the licensed establishment owned, leased or occupied by the club, and only to bona fide members of the club, and to serve, but not to sell, to members' bona fide guests. A club license is not transferable from person to person.
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> D. No member and no officer, agent or employee of a club licensee shall be paid or shall directly or indirectly receive, in the form of salary or other compensation, any of the profits from the revenue producing activities of the club or from the distribution or sale of alcoholic beverages to the members

> of the club or to its guests, beyond the amount of the salary as fixed and voted at a regular meeting by the members of the club licensee or by its governing body out of the general revenue of the licensee, nor shall such salaries or compensation be in excess of reasonable compensation for the services actually performed.
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> E. The board may revoke a club license issued pursuant to this section in any case where, in its judgment the licensee ceases to operate as a bona fide club as defined in § 4-101.

No other license restricts the holder thereof to the sale of alcoholic beverages to bona fide members of a narrowly defined group of people (club members). It is our opinion that a private club which holds a Series 6, 7 or 8 liquor license is bound by the statutory guidelines applicable to those licenses, and cannot retain such licenses if it excludes the general public.

This opinion is based on the conclusion that Series 6, 7 and 8 licenses are essentially designed to serve the public. As noted above, the club license is the only license which directs the holder of the license to sell and serve spirituous liquor only to bona fide club members and only to serve spirituous liquor to the guests of bona fide members. It is reasonable to infer that by omitting similar restrictions as to the other licenses the Legislature intended that the license holder sell to the public.

A.R.S. § 4-203.A provides that:

> A. The board shall issue a spirituous liquor license only after satisfactory showing of the capability, qualifications and reliability of the applicant, and, with the exception of club licensees, that the public convenience required and that the best interest of the community will be substantially served by the issuance.

In Patula v. Circle K Corporation, 17 Ariz.App. 317, 497 P.2d 824 (1972), the Court of Appeals of Arizona stated it is appropriate for the Board to examine into the question of existing licenses in the area, the extent of sales, the

extent of demand and other factors to enable it to reach its decision as to whether the new license will satisfy the requirement "that the public convenience required and that the best interest of the community will be substantially served by the issuance". Since the Board, before issuance of a Series 6, 7 or 8 license, must determine that the "public" convenience required and the "best interests of the community" will be substantially served, it seems to be an evasion of the legislative intent to permit a successful applicant to thereafter limit its sales and services to private club members.

It appears that the Legislature in Title 4 of the Arizona Revised Statutes, has attempted to accomplish a balance between a sufficient number of licenses to serve the public adequately and a restriction on the number of licenses designed to prevent the various evils that might result from an excessive number of licenses. In Chee Lee v. Superior Court of Maricopa County, 81 Ariz. 142, 302 P.2d 529 (1956), the court stated:

> The purpose of regulation and control in the sale of intoxicating liquors is not to prevent competition, Stanton v. Superior Court, 55 Ariz. 514, 103 P.2d 952, but has for its primary object the elimination of the excessive use of intoxicants thereby eliminating intemperance and social and moral evils that might otherwise be associated with the open bar. Mendelsohn v. Superior Court, 76 Ariz. 163, 261 P.2d 983. The enactment of section 72-107 must be taken as the adoption of means for accomplishing such purpose. 81 Ariz. at 147.

Section 72-107, initially enacted in 1939, provided for numerical restrictions on the issuance of certain licenses. Section 72-107 was subsequently amended several times, and today these numerical restrictions are found in A.R.S. § 4-206, which provides in part:

> A. The total number of spirituous liquor licenses issued within a single county for on-sale retailer's licenses providing for consumption on the premises of all spirituous liquors shall not exceed:

> 1. One license for each one thousand inhabitants for the first twenty-four thousand inhabitants within the county, and in addition
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> 2. One license for each two thousand inhabitants for the population within the county from twenty-five thousand through one hundred thousand inhabitants, and in addition
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> 3. One license for each two thousand five hundred inhabitants for the population within the county from one hundred one thousand inhabitants.
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> B. The total number of spirituous liquor licenses issued within a single county for on-sale retailers' licenses providing for consumption on the premises of beer and wine shall not exceed one license for each five hundred inhabitants, including licenses permitting the sale of beer and wine as provided in subsection A.

In Mayberry v. Duncan, 68 Ariz. 281, 205 P.2d 364 (1949), the court stated that the Superintendent in issuing a license in excess of the prescribed quota was acting without authority and the license so issued should be voided. It is thus apparent that the statutorily prescribed quota is not to be exceeded. A.R.S. § 4-203.F (A.R.S. § 4-203.G as of August 8, 1974) states that:

> A license which is not used by the licensee for a period in excess of six months shall revert to the state, except that the board may grant additional time if, in its judgment, the licensee is in good faith attempting to comply with this subsection.

A.R.S. § 4-203.F (A.R.S. § 4-203.G) can be seen as a legislative attempt to keep the limited number of licenses available (A.R.S. § 4-206) and in active use.

It is therefore our opinion that the Legislature has sought to authorize the number of licenses needed to adequately serve the public while restricting the total number of licenses so as to avoid the various evils associated with an excess of licenses. Note that Series 6, 7 and 8 licenses are subject to the numerical restrictions of A.R.S. § 4-206. Thus, when a private club which holds a Series 6, 7 or 8 license excludes the public, the effect is to upset the balance sought to be achieved by the Legislature. Conversely, because club licenses are exempted pursuant to A.R.S. §§ 4-205.B and 4-206.D from the numerical restrictions found in A.R.S. § 4-206, and because admittance to a bona fide private club is limited to the members and guests of members, the exclusion of the public from premises upon which a club license is issued would not substantially affect the balance sought to be achieved.

Also, if it is proper for one licensee holding a Series 6, 7 or 8 license to restrict admittance, then it would be proper for all to do so. A situation might then arise where the public convenience would be injured because there would only be a limited number of public establishments which the public could patronize. It is worthy of note that an opinion of the Attorney General of California (35 O.P.S. Cal. Atty. Gen. 93) reached the similar conclusion after analyzing essentially the same questions.

Thus, on the basis of the public nature of the Series 6, 7 and 8 licenses, it is our opinion that the holder of any such license, as a general principle, cannot exclude the public from the premises for which said spirituous liquor license was issued and yet retain the right to hold such license.

Respectfully submitted,

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The Attorney General

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